NO. 83-1988

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

GIOVANNI MASI, a/k/a "John Masi,"

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LUIS E. RIVERA-MONTALVO
Attorney at Law
6600 S.W. 57TH Avenue
Miami, Florida 33143
Telephone: (305) 661-1111

Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Whether the introduction of co-conspirator's out-of-court statements into evidence violated Defendant's right to confront and cross-examine the witnesses against him?

2. Whether the District Court erred in providing the jury during their deliberations with typed transcripts of recorded communications in violation of the best evidence rule, the rule against improper emphasis and repetition, and the rule against hearsay?

3. Whether the District Court erred in denying Defendant's motion to arrest judgment under Count III since the court was without jurisdiction of the offense charged because the offense was not commited in its district?

4. Whether opening remarks by trial defense counsel regarding cocaine seized from the Defendant at the time of his arrest required a cautionary instruction by the District Court, sua sponte, in light of the government's decision to rest their case without presenting this evidence to the jury?

5. Whether the District Court erred in not granting Defendant's motion for a mistrial on account of prosecutor's comment upon Defendant's failure to testify before the jury?

6. Whether the District Court exceeded its authority when it imposed a particularly severe sentence against the Defendant?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the United States District Court were Raymond J. Dearie, United States Attorney for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201, Respondent-Appellee herein; and GIOVANNI MASI, Petitioner-Appellant herein.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, GIOVANNI MASI, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 6, 1984.

OPINION BELOW

The judgment of the United States District Court for the Eastern District of New York (Appendix A, infra, p. A1), was entered on August 23, 1983. The opinion of the United States Court of Appeals for the Second Circuit was filed on April 6, 1984. The opinion is reproduced as Appendix B, infra, p. A1.

JURISDICTION

The judgment of the Court below (Appendix B, infra, p. B1) was not reported. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. Sect. 1254 (1).

STATUTORY PROVISIONS INVOLVED

Title 21 U.S.C. Sect. 841(a)(1) pertaining to controlled substances provides, as follows:

> "(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or"

Title 21, U.S.C. Sect. 846 pertaining to controlled substances provides as follows:

> " Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

STATEMENT OF THE CASE

The Defendant was charged by Second Superseding Indictment with violations of Federal Narcotics laws during the

period from December 1, 1982, to March 24, 1983. Named in the indictment were the Defendant and Co-defendant CINELLI only. Count I alleged conspiracy between the defendants during the period from December 1, 1982, to March 24, 1983, to violate Section 841(a)(1) of Title 21, United States Code, by distributing and possessing with intent to distribute substantial quantities of cocaine hydrochloride. Count II alleged that on December 1, 1982, the Defendants distributed a quantity of cocaine hydrochloride (one ounce). Count III alleged that on February 9, 1983, the Defendants possessed with intent to distribute within the Eastern District of New York and elsewhere, a quantity of cocaine hydrochloride (four ounces).

Meanwhile, CINELLI surrendered to Government authorities and was released

pending trial upon security.

The Defendant was apprehended on March 24, 1983, at his residence in Miami, Florida, upon Complaint filed in the Eastern District of New York alleging violation of Federal Narcotics laws. At the time of his apprehension, police authorities seized from Defendant's pants a small vial containing about one grain of cocaine hydrochloride.

After a bond hearing held at Miami, Florida, Defendant was transferred to New York. Bail was set at an amount which the Defendant could not afford.

Upon his first appearance in the Eastern District of New York, the Defendant was advised of his indictment. At a subsequent Bond hearing, the Defendant was advised that a superseding indictment had been returned. The Defendant stood mute to the indictment,

and the Court entered a plea of not guilty. At the time, the Defendant's counsel made several requests, including a motion to transfer the case to Florida. (Although not specifically said, this was a motion for change of venue.) A few weeks later, the Defendant retained the services of trial defense counsel, JOHN JACOBS, who pursued the Defendant's legal representation until prior to sentencing. A Second Superseding Indictment was returned shortly before trial.

CINELLI plead guilty to Count II with the understanding that he would not testify for the Government or the Defendant and was awaiting sentencing at the time of Defendant's trial. Defendant's conviction is based on testimony of Special Agent HAMILL, who had acted in an undercover capacity, out-of-court statements of co-Defendant CINELLI as reported by

HAMILL, and recorded telephone conversations.

At trial defense counsel's request, an evidenciary hearing was held to determine the admissibility of the evidence seized at the time of Defendant's apprehension. The Court ruled that the cocaine hydrochloride would be admitted into evidence. At trial, the Government rested its case without using any of the evidence seized at the time of defendant's apprehension.

However, during his opening remarks to the jury, trial defense counsel had made reference to the vial with cocaine found when the Defendant was arrested.

On December 1, 1982, CINELLI sold one ounce of cocaine hydrochloride to HAMILL. CINELLI and HAMILL had subsequent conversations for the sale of additional quantities of cocaine hydrochloride. During

the course of recorded telephone conversations between CINELLI and HAMILL, reference was made to "JOHN," who could provide quantities of cocaine. HAMILL and CINELLI continued their negotiations and, on February 7, 1983, HAMILL called the Defendant at his place of residence reportedly to negotiate the price of a quantity of cocaine. The Defendant hung up the telephone on HAMILL. Further, there was no specific reference to any drugs during their conversations. However, recorded conversations between CINELLI and HAMILL showed CINELLI's involvement with drugs and his partner "JOHN." The Government contended that CINELLI had entered into a conspiracy to distribute drugs with a person known as "JOHN," and that "JOHN" was Defendant MASI.

The Defendant never went to the

Eastern District of New York and there were no other recorded conversations between HAMILL and the Defendant. Further, no drugs were seized or secured other than the one ounce of cocaine which was sold by CINELLI.

The evidence at all times showed that the offense alleged under Count III was committed in Florida and not in New York.

During his rebuttal argument, the Government made specific reference to the Defendant's failure to testify regarding disputed telephone conversations where the Government claimed the Defendant had discussed the sale of narcotics in furtherance of the conspiracy charge.

Specifically, the Government argued:

> " Mr. Jacobs said there were only four of the telephone conversations successfully recorded. We know four telephone conversations were successfully recorded. The defendant can explain that-Mr.

> "Jacobs can't explain that way, ladies and gentlemen, because we all heard the conversations. Two of them were with the defendant sitting here. (Indicating.) And Agent Hamill identified Mr. Masi's voice on both of those telephone conversations." (emphasis added) (Trial Record Page 325 at 11-19).

Upon this improper argument of counsel, the Defense made a timely motion for mistrial, which was denied.

Once the jury's verdict was announced, trial defense counsel requested and the Court allowed for motions under Rule 29(c), Federal Rules of Criminal Procedure, to be made at the time of sentencing. On August 24, 1983, the Defendant was sentenced to ten years of imprisonment on each count of the Second Superseding Indictment to run concurrently in addition to a special parole term of ten years. A motion to arrest judgment under Count III was denied.

REASONS FOR GRANTING THE WRIT

I.

THE CONVICTION ON COUNTS I AND II MUST BE REVERSED FOR THE REASON THAT IT IS BASED UPON IMPROPER EVIDENCE

The Defendant's conviction of Counts I and II is predicated upon the out-of-court statements of Co-Defendant CINELLI that there was a person named "JOHN" who was involved with him in the sale of drugs and the testimony of Special Agent HAMILL that this person "JOHN" was the Defendant.

Trial defense counsel objected to the use of the out-of-court recorded conversations and oral statements in evidence. The basis for his objection was that while the hearsay statements may in fact pass the test for admissibility under Rule 801(d)(2)(E), Federal Rules of Evidence, they were nonetheless inadmissible under the Sixth Amendment's

confrontation clause.

FIRST, before the out-of-court statements can be admitted into evidence, three requirements must be established. (A) there must be independent evidence establishing that the person against whom the statement is offered participated in the conspiracy. (B) the statement must have been in furtherance of the conspiracy. (C) the co-conspirator's statement must have been made during the life of the conspiracy. The first and second prerequisites were not met in this case. There was no evidence, "independent" or otherwise, of any other person being involved with CINELLI in the sale of December 1, 1982. We can assume that CINELLI obtained or otherwise secured the drugs from someone else, but not that there was a "conspiracy." Mere association with those who have conspired

cannot alone support a conviction for conspiracy. United States v. Torres, 519 F 2d 723 (2nd Cir.), cert. denied, 423 U.S. 1019 (1975). Further, it was not shown that the statements were in furtherance of the conspiracy. The "in furtherance" requirement has been given a broad interpretation; however, the sale of December 1, 1982, had already been consummated and it cannot be said that anything could be done "in furtherance" of it.

SECOND, the Sixth Amendment guarantees that "...the accused shall enjoy the right...to be confronted with the witnesses against him." The admission of out-of-court statements made by CINELLI had the effect of denying the Defendant his constitutional right to confront and cross-examine his accusers.

The confrontation clause issue and

the evidenciary question must be separately analyzed, and the Sixth Amendment may require the exclusion of evidence, even though admissible under Fed. R. Evid. 801 (d)(2)(E). United States v. Gibbs, 703 F. 2d 683 (3rd Cir. 1983); United States v. Perez, 658 F. 2d 654 (9th Cir. 1981); United States v. Palumbo, 639 F. 2d 123(3rd Cir.), cert. denied, 454 U.S. 819 (1981); United States v. Puco, 476 F. 2d 1099 (2d Cir.), cert. denied, 414 U.S. 844 (1973).

In Ohio v. Roberts, 448 U.S. 56 (1980), this Court identified two restrictions that the confrontation clause imposes on the use of hearsay evidence in criminal trials. First, the Government must show that the hearsay evidence is necessary because the declarant is unavailable. Second, the hearsay statement must be reliable.

CINELLI was called to testify at a hearing outside the presence of the jury. Upon inquiry by trial defense counsel, CINELLI invoked the Fifth Amendment privilege, which could render him legally "unavailable." Holt v. Wyrick, 649 F. 2d 543 (8th Cir. 1981), cert. denied, 454 U.S. 1143 (1982). However, the trial judge admonished CINELLI that he could not claim the privilege and commanded his testimony. It then became evident that CINELLI was refusing to testify in accordance with an agreement reached with the Government. The Government should not have been allowed to claim that CINELLI was unavailable when it caused his unavailability by misleading him about his plea agreement. Further, notwithstanding United States v. Lang, 589 F. 2d 92 (2nd Cir., 1978), the circumstances were particularly appropriate to

require the Government to grant immunity to CINELLI before offering the out-of-court statements or otherwise abate the prosecution.

To further compound the prejudicial effect of the out-of-court statements, the trial court allowed the jury to take into their deliberations typed transcripts of the recorded conversations. Trial defense counsel entered a timely objection. The use of these transcripts during jury deliberations violated the best evidence rule, the rule against improper emphasis and repetition, and the rule against hearsay.

The use of typed transcripts as visual aids to the jury in listening to the playback of recorded communications is a matter within the sound discretion of the trial judge. United States v. Carson, 464 F.2d 424 (2nd Cir.), cert.

denied, 409 U.S. 949 (1972); Fountain v. United States, 384 F.2d 624 (5th Cir.), cert. denied, Marshall v. United States, 390 U.S. 1005 (1968); United States v. Hall, 342 F.2d 849 (4th Cir.) cert. denied, 382 U.S. 812 (1965). However, there is apparent conflict amongst the Circuits regarding the jury's use of this evidence during their deliberations.

In United States v. John, 508 F.2d 1134, stay denied Lekometros v. United States, 420 U.S. 917, cert. denied Bernstein v. United States, 421 U.S. 962, and John v. United States, 421 U.S. 962, rehearing denied, 421 U.S. 962 (1974), the Court approved the use of these "visual aids," but with marked emphasis upon the fact that "...the transcripts were not made available to the jury during its deliberations," supra, at page 1141. On the other hand, United States

v. Koska, 443 F.2d 1167 (2nd Cir.), cert. denied, 404 U.S. 852 (1971), approved of the jury's use of transcripts during their deliberations.

With the advent of sophisticated electronic surveillance, it is imperative that the trial courts apply a uniform standard for the use of transcripts of recorded conversations.

II.

THE CONVICTION ON COUNT III MUST BE REVERSED FOR THE REASON THAT THE DEFENDANT WAS DENIED HIS RIGHT TO TRIAL IN THE DISTRICT IN WHICH THE OFFENSE WAS COMMITTED

There is no dispute that the offense alleged under Count III occurred in Miami, Florida, instead of the Eastern District of New York, if at all. Notwithstanding the Court of Appeals below has determined that Defendant's objection to venue was waived because of the

failure to raise it appropriately in the trial court. The Court cites United States v. Menendez, 612 F.2d 51 (2nd Cir. 1979) for the apparent proposition that the Defendant waived the venue objection when he made his motion for acquittal without referring to venue.

When the Defendant was confronted with the superseding indicment, he requested transfer of his case for trial in Miami, Florida. Further, once the jury's verdict was announced, the trial court authorized the Defendant to make motion for judgment of acquittal at the time of sentencing, at which time Defendant's counsel moved to arrest judgment under Rule 34, Federal Rules of Criminal Procedure.

The decision denying Defendant's motion to arrest judgment was in error and the Court of Appeals below has

sanctioned such departure from the rules of law as to call for an exercise of this Court's power of supervision. The Court of Appeals below has overlooked the matters of record in this case.

III.

TRIAL DEFENSE COUNSEL'S OPENING REMARKS ABOUT EVIDENCE NOT USED DURING TRIAL AND PROSECUTOR'S COMMENT UPON DEFENDANT'S FAILURE TO TESTIFY BEFORE THE JURY COUPLED WITH A PARTICULARLY SEVERE SENTENCE DEPRIVED THE DEFENDANT OF A FAIR TRIAL

The practice of trial defense attorneys of bringing out during opening remarks that evidence which is known to be prejudicial to the defendant and for which the Government has received a favorable ruling upon admissibility in order to take out the "sting" associated with disclosure of this prejudicial information to the jury is widely accepted. This practice is a legitimate trial

technique which has been given wide dissemination. Indeed, trial defense counsel should not risk defendant's conviction of serious criminal charges because of blemishes in the accused's record. Just because a person might have made one mistake, it does not mean that he is a serious criminal offender.

During opening remarks, trial defense counsel made specific reference to a grain of cocaine found in Defendant's pants. Without prior notice, the Government rested its case without presenting or making reference to this cocaine.

Absent Counsel's disclosure of Defendant's possession of cocaine, the jury was called to decide Defendant's case without any evidence of predisposition to drugs. There was no prior criminal record. Whether the Government

had the plan or design to induce trial defense counsel to comment upon evidence which had little probative value in this case and which they did not intend to present to the jury, or whether the Government inadvertently forgot to offer this evidence is unknown to us. However, the trial judge failed to safeguard the right of the accused to a fair trial by not advising the jury to disregard references made by trial defense counsel to matters which were not in evidence. We believe that the prejudicial effect was such that a cautionary instruction, sua sponte, was required in the charge to the jury.

Our inquiry into this matter has failed to show any legal authority for or against the proposition we now advance. However, we feel this is an important question of federal law which should be

settled by this Court.

To further compound the unfairness of these proceedings, the prosecutor challenged and pointed to the Defendant to explain the telephone conversations between the Defendant and others. These conversations were part of the core of the Government's case against the Defendant. Government counsel's statement is a matter of record.

Trial defense counsel made a timely objection and moved for a mistrial. However, both the trial court and Court of Appeals have dismissed this challenge as a "slip of the tongue" or "inadvertent" comment.

In United States v. Tierney, 424 F.2d 643, cert. denied, 400 U.S. 850, it was established that the test for whether there was comment on defendant's failure to testify is whether language used was

manifestly intended or was of such character that the jury would naturally and necessarily take it to be such comment. This is the situation in our case.

We cannot conceive of a more direct reference to the accused's failure to present evidence or to testify on the merits of the case than by asking the Defendant to "explain" and then almost simultaneously pointing or "indicating" at the person of the Defendant.

There may be cases in which there is intentional comment on Defendant's absolute right to remain silent, but those may be just four instances as suggested in United States Ex Rel Leak v. Follette, 418 F. 2d 1266, 1270 (2nd Cir., 1969). All others would be termed "inadvertent" as opposed to "intentional," thereby taking all the substance off the constitutional right of the accused.

This Court cannot allow this to happen.

The trial court should have admonished the Government in open court and conducted an individual inquiry of each and every member of the jury to determine their ability to disregard such prejudicial comments or grant a mistrial. The prejudicial effect of this violation of Defendant's constitutional right to remain silent and not have to "explain" anything to the jury cannot be corrected at this late stage of the proceedings, and therefore, he is entitled to reversal of his conviction on all counts of the Second Superseding Indictment.

Throughout trial, the trial judge made it evident to the Defendant that he was unhappy with him. The trial judge argued that he was playing games with the Court when he refused to waive provisions of the Speedy Trial Act. Further, the

trial judge stated that he wanted the Defendant to get a "full hearing" because he had in mind a "very substantial sentence" for him and he better know it.

We do realize that criminal sentences are not generally reviewable. Counts V. United States, 527 F.2d 542 (2nd Cir., 1975); McGee V. United States, 462 F. 2d 243 (2nd Cir. 1972). However, a court's failure to take appropriate steps to insure the fairness and accuracy of the sentencing process must be held to be plain error and an abuse of that discretion warranting review. United States v. Robin, 545 F. 2d 775, (2nd Cir., 1976).

The Court of Appeals below dismissed Defendant's contention about his sentence, arguing that it is "well within the statutory range." In so doing, the Court overlooked the body of law governing the sentencing process and the particular

contentions of this Defendant.

The conduct of Defendant's trial showed a departure of the proper judicial proceedings and the Court of Appeals below has sanctioned such departure so as to call for an exercise of this court's power of supervision by this Writ.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

LUIS E. RIVERA-MONTALVO
Attorney at Law
6600 S.W. 57th Avenue
Miami, Florida 33143
Telephone: (305) 661-1111

Attorney for Petitioner

CERTIFICATE OF MAILING

STATE OF FLORIDA)
) SS.:
COUNTY OF DADE)

On May 31, 1984, I served the within PETITION FOR A WRIT OF CERTIORARI on the interested parties in said action, by placing a true copy in each of two sealed envelopes, with First-class postage pre-paid, in a United States post office at Miami, Florida, addressed as follows:

REX T. LEE
Solicitor General
of United States
Department of
Justice
Washington,
D.C. 20530

RAYMOND J. DEARIE
United States
Attorney for the
Eastern District of
New York
225 Cadman Plaza
East
Brooklyn, NY 11201

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on this 31st day of May, 1984, at Miami, Florida.

LUIS E. RIVERA-MONTALVO

APPENDIX A

United States of America vs.

GIOVANNI MASI

United States District Court for the EASTERN DISTRICT OF NEW YORK

DOCKET NO. CR 83-00141(S-1)

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH DAY YEAR: AUGUST 24, 1983

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel

[X] WITH COUNSEL LUIS ERNESTO RIVERA (Name of Counsel)

FILED

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea. [ ] NOLO CONTENDERE [ ] NOT GUILTY

There being a finding/verdict of { [ ] NOT GUILTY. Defendant is discharged / [X] GUILTY. to counts 1,2 &3. }

TIME A.M. P.M. FILED

Defendant has been convicted as charged of the offense(s) of violating T.21 U.S.C. Sections 841(a)(1) 846; T. 18 U.S.C. Section 2.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten (10) years on count 1, ten (10) years and a Special Parole term of ten (10) years on count 2 and ten (10) years and a Special Parole term of ten (10) years on count 3. Said sentences to run concurrently.

On motion of Assistant U.S. Attorney Peter J. Tomao, the underlying indictment and the first superseding indictment are dismissed as to the defendant Masi.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Jacob Mishler

Date August 24, 1983

APPENDIX B

B1

United States Court of Appeals

For The

Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the
6th day of April
one thousand hundred and eighty-four.

Present:
HONORABLE WILFRED FEINBERG,
Chief Judge
HONORABLE HENRY J. FRIENDLY,

HONORABLE JAMES L. OAKES,
Circuit Judges

UNITED STATES OF AMERICA,

Appellee,

- v. - 83-1351

GIOVANNI MASI, a/k/a "John Masi,"

Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said district court is AFFIRMED.

1. Co-conspirator Cinelli's statements were admissible under Fed. R. Evid. 801(d)(2)(E), and admission of the statements did not deny Masi confrontation rights. There was ample evidence, independent of Cinelli's statements, that Masi participated in the cocaine distribution conspiracy. Moreover, Cinelli's statements, made in furtherance of the conspiracy, bore sufficient indicia of reliability and did not violate Masi's constitutional rights. See United States v. Perez, 702 F.2d 33, 37 (2d Cir.) (per curiam), cert. denied, 103 S.CT. 2457 (1983).

2. The court did not abuse its discretion in providing the jury, during deliberations, with transcripts of recorded conversations especially when there was no claim that the transcripts were inaccurate and the court had cautioned the jury on the proper use of the transcripts. See United States v. Koska, 443 F.2d 1167, 1169 (2d Cir.), cert. denied, 404 U.S. 852 (1971).

3. Masi's contentions regarding chain of custody are, on this record,

with merit. Also without merit is his contention that the court was required, sua sponte, to give a cautionary instruction concerning defense counsel's reference in his opening statement to evidence which the government did not offer at trial.

4. There was no violation of Masi's speedy trial rights, since the period excluded due to the illness of trial counsel was properly excluded pursuant to the ends of justice provision of 18 U.S.C. Sect. 3161 (h)(8)(A). Also, Masi apparently claims before us that venue was improper. However, this claim was waived because of the failure to raise it appropriately in the trial court. See United States v. Menendez, 612 F. 2d 51, 55 (2d Cir. 1979). Masi's apparent contention that there was a material variance between the conspiracy period charged and the period proven at trial is similarly unavailing since Masi was given adequate notice in the indictment of the crimes alleged and the proof at trial fell within the period charged. See United States v. Heimann, 705 F.2d 662, 666 (2d Cir. 1983).

5. Masi argues that the prosecutor improperly commented on Masi's failure to testify. However, viewed in context, the comment appears to have been inadvertent and, in any event, was not "of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." United States ex rel. Leak v. Follette, 418 F.2d 1266, 1269 (2d Cir.

1969), cert. denied, 397 U.S. 1050 (1970). Contrary to Masi's assertion that the court erred in its instruction on flight, the charge was proper as given.

6. Masi's contention that he was arbitrarily denied trial by the jury of his choice is without merit. The claim that Masi's sentence was too severe is also unavailing, since it was well within the statutory range.

7. We have examined all of Masi's contentions and find them to be without merit.

WILDFRED FEINBERG, Chief Judge

HENRY J. FRIENDLY,

JAMES L. OAKES,
Circuit Judges.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

No. 83-1988

In the Supreme Court of the United States

OCTOBER TERM, 1984

GIOVANNI MASI a/k/a "JOHN MASI," PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

VINCENT P. MACQUEENEY
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the admission of a co-conspirator's statements was invalid under Fed. R. Evid 801(d)(2)(E) or the Sixth Amendment Confrontation Clause.

2. Whether typed transcripts of recorded phone calls were properly given to the jury at its request during deliberations, when the transcripts had already been admitted into evidence and shown to the jurors without objection during trial.

3. Whether the trial court lacked jurisdiction over the offense charged in Count III, which took place in Florida, although no specific request for a change of venue was made in the trial court.

4. Whether the trial judge should have given, *sua sponte*, a cautionary instruction with respect to the opening statement of petitioner's counsel concerning petitioner's possession of a vial of cocaine, not offered in evidence at the trial.

5. Whether the prosecutor improperly commented on petitioner's failure to testify during his rebuttal argument to the jury.

6. Whether petitioner's sentence was too severe.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1988

GIOVANNI MASI a/k/a "JOHN MASI," PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B4) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1984. The petition for a writ of certiorari was filed on June 1, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of conspiring to distribute and possess with intent to distribute cocaine, in violation of 21 U.S.C. 846, and on two counts of aiding and abetting the distribution of cocaine, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. Petitioner was sentenced to concurrent ten-year

prison terms on all three counts and additional concurrent ten-year special parole terms on the aiding and abetting counts. The court of appeals affirmed (Pet. App. B1-B4).

The evidence adduced at trial showed that petitioner was involved, along with "Joe" Cinelli, in illegal drug transactions in New York and Florida.[1] A government informant named "George" set up a "buy" on December 1, 1982, between Cinelli, who resided in Miami, Florida, and DEA Agent Edward Hamill at a Long Island restaurant (Tr. 40-44, 77-80). Although Hamill asked to buy only one of the five ounces of cocaine Cinelli offered for sale, he indicated his intention to buy large quantities in the future. Cinelli assured Hamill that he "would have no problem providing * * * kilogram quantities of cocaine" (Tr. 44, 54). The sale was consummated outside the restaurant, where an FBI agent observed Hamill purchase an ounce of cocaine from Cinelli for $2,000. The cocaine was compacted into small, white balls, a bit larger than a marble. Cinelli explained that this was pure cocaine, ingested by couriers from Colombia, who excreted it on arrival in the United States. Tr. 45-56, 126-127, 201.

While still in Hamill's car during this same transaction, Hamill and Cinelli negotiated for the sale of four kilos of cocaine, eventually agreeing on a price of $52,000 per kilo. Nevertheless, Cinelli told Hamill that the price was "subject to his partner in Miami, John's approval" (Tr. 52). Cinelli told Hamill that delivery from Florida would have to be approved by "John" (Tr. 51). Later, on December 7, 1982, Agent Hamill telephoned Cinelli in Miami, who said that he had discussed the deal with "John in Miami, his partner and

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[1]Prior to trial, Cinelli pleaded guilty to aiding and abetting petitioner in distributing cocaine, in exchange for the government's agreement to move for dismissal of other charges. On August 24, 1983, Cinelli was sentenced to four years' imprisonment and a six year special parole term.

roommate," and that they were reluctant to come to New York at that time (Tr. 54-55).[2] In a subsequent recorded conversation on December 10, 1982, Cinelli informed Hamill that he had discussed the situation with "the man," his "partner John," and that John would not authorize him to bring four kilograms of cocaine to New York. Rather, John insisted that Hamill come to Miami to purchase the cocaine and that the price would be $54,000 per kilo (Tr. 55-56, 65). When Hamill protested about coming to Florida and the new conditions, Cinelli said "this is the way its gotta be, you know, I can't do anything else, you know. If I was the man, if I was John, you know, then I would take the gamble" (Tr. 69).

After additional calls setting up the deal, in which Cinelli again advised that he had to obtain John's approval (Tr. 78-80), Agent Hamill arrived in Miami on February 6, 1983, accompanied by the informant "George" and several FBI agents. Hamill spoke with Cinelli in a recorded conversation about "John's" demand for payment of $7,200 before any transaction, which sum was to cover the loss of three ounces of cocaine that Cinelli had brought to New York in December. Hamill was told to call back in half an hour, when John would have returned (Tr. 85-86, 95-98). When he called, "John" answered the phone; he stated that he did not want to talk about the new terms proposed by Hamill for the deal, and hung up (Tr. 98-99). However, George later called "John" and discussed the $7,200 debt arising out of the lost cocaine balls (Tr. 87-88, 99-100). "John" told George that "[w]hen you get seventy-two hundred together, I'll talk to you."

The following day, Hamill and George met Cinelli and petitioner, accompanied by an unknown man, at a Miami restaurant, while an FBI agent observed the meeting from a

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[2]This telephone conversation was recorded but due to faulty equipment was inaudible (Tr. 130-131).

nearby table (Tr. 104-105, 204-205). Cinelli introduced petitioner to Hamill as his "partner, John." Hamill, Cinelli, and petitioner discussed payment for the lost three ounces of cocaine (Tr. 103). Cinelli began the conversation by stating that three ounces of cocaine from the amounts "John" had authorized him to sell Hamill the previous December were missing. Petitioner stated that, since Hamill had been the designated purchaser, he was responsible for the loss. Tr. 103. Petitioner also stated that "once the $7,200 debt was cleared up he would do unlimited quantities of cocaine," adding that "the coke was located five or ten minutes from the restaurant" (Tr. 104). Hamill offered to pay more for the first kilo to cover the cost of the debt; this offer was accepted by petitioner (*ibid.*). Later that evening Hamill spoke to petitioner by telephone and offered to purchase four ounces of cocaine for $15,000, a price $7,000 over its value, as a sign of good faith. Petitioner agreed and assured him that following this transaction "we could do the six keys" (Tr. 105-106).

Hamill met with petitioner at the restaurant the next day (Tr. 107). After discussing the $15,000 deal, petitioner indicated that he would "authorize Joe to do the six kilos * * * as soon as this deal goes" (Tr. 108).[3] Later they went outside to petitioner's Mustang, where petitioner removed a manilla envelope containing a plastic bag "filled to capacity" with small white powder "balls" that looked just like the cocaine involved in the New York deal (Tr. 110). As agents approached petitioner's car in their vehicles, petitioner escaped (Tr. 234-237); he was arrested by DEA agents at his residence in Miami several weeks later (Tr. 238-242, 248-249).

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[3]At this meeting, petitioner reiterated that he had "authorized Joe Cinelli to sell [Hamill] five ounces of cocaine up in New York" and that "when Cinelli returned from Florida three ounces were unaccounted for." Tr. 107-108.

ARGUMENT

1. Petitioner contends (Pet. 11-16) that Cinelli's out-of-court statements were improperly admitted as co-conspirator's statements under Fed. R. Evid. 801(d)(2)(E), and in violation of Confrontation Clause of the Sixth Amendment. This fact-bound argument is totally without merit and warrants no further review by this Court.

In order to admit co-conspirator statements under the Rule there must ordinarily be a showing by a preponderance of independent evidence (1) that a conspiracy existed; (2) that the declarant and the defendant against whom the statement is admitted were both members of the conspiracy; and (3) that the statement was made in furtherance of the conspiracy. *United States* v. *Regilio*, 669 F.2d 1169, 1174 (7th Cir. 1981), cert. denied, 457 U.S. 1133 (1982); *United States* v. *Nardi*, 633 F.2d 972, 974 (1st Cir. 1980); *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970).

Petitioner argues that there was no independent evidence that he was involved with Cinelli in December 1982, or that the statements were in furtherance of the conspiracy. However, the court of appeals properly found that there was "ample evidence, independent of Cinelli's statements" (Pet. App. B2) that petitioner was a member of the conspiracy to distribute cocaine; it also found that Cinelli's statements in furtherance of the conspiracy were reliable. The same finding having been reached by both lower courts (see Tr. 279), further review by this Court is unwarranted. See *Berenyi* v. *Director, Immigration and Naturalization Service*, 385 U.S. 630 (1967).

The facts of the case, recounted in detail above, plainly support the lower courts' findings. Petitioner himself told Hamill at their first face-to-face meeting on February 8, 1983, in Miami that he had "authorized" Cinelli to sell him

five ounces of cocaine the previous December in New York and that he was holding Hamill responsible for the "loss" of three ounces of cocaine in that transaction. The sequence of face-to-face meetings and telephone calls between Hamill and petitioner in Florida, in which petitioner repeatedly said he would sell six kilos of cocaine to Hamill after he compensated him for the three ounces lost in New York, constitutes ample evidence that a conspiracy existed from December 1, 1982, that petitioner and Cinelli were participants in the conspiracy, and that Cinelli's statements were in furtherance of the conspiracy.[4]

Petitioner argues in the alternative (Pet. 13-16) that Cinelli's out of court statements violated his Sixth Amendment confrontation rights despite their admissibility under Fed. R. Evid 801(d)(2)(E). This argument was properly rejected by the courts below (Pet. App. B4).

First, as already noted, there was more than ample evidence demonstrating the reliability of Cinelli's statements. It is indeed difficult to imagine more copious corroboration of out-of-court statements than was adduced in this case.

Second, petitioner challenges whether Cinelli was "unavailable." As a legal matter, statements admissible under Fed. R. Evid. 801(d)(2)(E) are not defined as "hearsay" under the Federal Rules of Evidence, and thus are not subject to any requirement of "unavailability." See generally *United States* v. *Gibbs*, 739 F.2d 838, 848 nn. 22, 23 (3d Cir. 1984) (en banc). But even assuming that unavailability is required, the

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[4]The aborted drug deal between petitioner and Hamill involving "balls" of cocaine similar to that sold by Cinelli in New York, together with petitioner's flight from the scene, provide additional independent evidence of the conspiracy and of the reliability of Cinelli's statements.

statements statisfied the standard. Cinelli appeared in court and invoked his Fifth Amendment privilege against self-incrimination on advice of counsel (Tr. 259, 266-268). Petitioner recognizes (Pet. 15) that an assertion of the privilege can render a witness "unavailable" (see *Holt* v. *Wyrick*, 649 F.2d 543 (8th Cir. 1981), cert. denied, 454 U.S. 1143 (1982)), but argues that Cinelli should have been given immunity, obviating the need to assert the privilege, or alternatively that the privilege was asserted because of Cinelli's belief that he was required to do so under the plea agreement. Contrary to petitioner's assertion (Pet. 15-16), Cinelli did not invoke his privilege because of his plea agreement, but because charges were pending against him (Tr. 270, 275).[5] Nor does petitioner offer any reason for departing from the settled rule that the court "ordinarily need not grant statutory immunity to defense witnesses" (*United States* v. *Burns*, 684 F.2d 1066, 1077 (2d Cir. 1982)).

2. Petitioner also contends (Pet. 16-18) that the trial judge abused his discretion when, at the request of the jury, he supplied it with typed transcripts of the recorded conversations, cautioning the jurors that the transcripts were limited to use as an aid as they listened to "the primary evidence" (Tr. 63-64, 93-94). In the absence of any objection to the prior admission of the taped transcripts into evidence or to their accuracy at trial or on appeal, there is absolutely no showing that the trial judge abused his discretion when he made them available to the jury at their request, subject to appropriate instructions. See *United States* v. *Koska*, 443 F.2d 1167, 1169 (2d Cir.), cert. denied, 404 U.S. 852 (1971). Contrary to petitioner's argument that there is a

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[5]The remaining two counts were still pending against petitioner while he was awaiting sentencing on Count III. In response to an argument by petitioner's counsel, the judge told Cinelli he could withdraw his guilty plea. Tr. 270, 275.

conflict among the circuits, the court in *United States* v. *John*, 508 F.2d 1134 (8th Cir.), cert. denied, 421 U.S. 962 (1975), did not preclude the jury from using transcripts of tape recordings during deliberations, but simply held that there was no abuse of the trial court's discretion under the facts there.

3. Petitioner next contends (Pet. 18-20) that his conviction on Count III must be reversed because he was denied his right to be tried in Florida, where the offense was committed. However, he failed to object to venue in the district court, and the court of appeals correctly held that his claim was waived due to his failure to raise it in timely fashion. Fed. R. Crim. P. 12(b); *United States* v. *Grammatikos*, 633 F.2d 1013, 1022 (2d Cir. 1980); *United States* v. *Menendez*, 612 F.2d 51, 55 (2d Cir. 1979); *United States* v. *Price*, 447 F.2d 23, 27 (2d Cir.), cert. denied, 404 U.S. 912 (1971). Although petitioner asserts (Pet. 20) that "[t]he Court of Appeals below has overlooked the matters of record in this case," he neither cites to nor quotes any timely motion expressly raising the question of venue or otherwise supporting his charge. Plainly, petitioner has not identified any "such departure from the rules of law as to call for an exercise of this Court's power of supervision" (*ibid.*).

4. Petitioner contends (Pet. 20-22) that the trial judge was required, sua sponte, to give a cautionary instruction when petitioner's counsel made reference in his opening statement to a vial of cocaine found in petitioner's pants when he was arrested. However, petitioner concedes (Pet. 22) that he has no legal authority to sustain this claim. In any event, the government did not offer this evidence at trial, and the comment was fleeting in nature. Accordingly, counsel may have properly concluded that any instruction would have only highlighted the statement. Certainly, no error, much less the "plain error" necessary to warrant reversal (see, *e.g.*, *United States* v. *Cano*, 702 F.2d 370, 371 (2d Cir. 1983)), has been shown here.

5. Petitioner also claims (Pet. 23-25) that it was error for the trial court not to grant a mistrial due to a comment by the prosecutor in rebuttal, which petitioner claims was a comment on his failure to testify. However, it is clear from the context in which the comment was made that the court below was correct in finding that the comment was inadvertent, and in any event was not of such a nature that the jury would take it to be a comment on the accused's failure to testify. *United States ex rel. Leak* v. *Follette*, 418 F.2d 1266, 1269 (2d Cir. 1969), cert. denied, 397 U.S. 1050 (1970).[6] Petitioner does not challenge the propriety of the standard employed below in determining whether reversal is required, but argues only the fact-bound claim that the wrong conclusion was reached under that standard.

6. Finally, petitioner complains (Pet. 25-27) that his sentence was "particularly severe." The court below properly disposed of this contention by noting that the sentence of ten years was well within the statutory range (Pet. App.

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[6]In response to petitioner's counsel's argument that the government failed to prove its case because not all conspiritorial calls and meetings had been recorded, the Assistant U.S. Attorney replied:

> Now, Mr. Jacobs raises questions, he said he counted a series of fif[teen] meetings and telephone conversations. I will tell you frankly I was not here during the course of the trial with a calculator counting how many meetings or telephone conversations there were. I don't believe it was particularly important.
>
> Mr. Jacobs said there were only four of the telephone conversations successfully recorded. We know four telephone conversations were successfully recorded. *The defendant can explain that — Mr. Jacobs can't explain that away, ladies and gentlemen,* because we all heard the conversation. Two of them were with this defendant sitting here. (Indicating). And Agent Hamill identified Mr. Masi's voice on both of those telephone conversations.

(Tr. 325-326) (emphasis added).

It is obvious that the words "the defendant can explain that" were an innocuous "slip of the tongue," as the trial judge found (Tr. 343).

B4). Petitioner does not dispute that his sentence (the possible maximum was 45 years) falls well within the statutory limits. His argument is therefore frivolous. See *Dorszynski* v. *United States*, 418 U.S. 424, 431 (1974); *United States* v. *Tucker*, 404 U.S. 443, 453 (1972); *United States* v. *Mennuti*, 679 F.2d 1032, 1037 (2d Cir. 1982).

CONCLUSION

The petition for a writ of certiorari should be be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

VINCENT P. MACQUEENEY
Attorney

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